

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANDRES CIRILO CABALLERO,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 239983

Wayne Circuit Court

LC No. 01-005065

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of one count of criminal sexual conduct in the first degree (CSC I), the victim being under thirteen years of age, MCL 750.520b(1)(a), and one count of attempted criminal sexual conduct in the second degree (CSC II), the victim being under thirteen years of age, MCL 750.520c(1)(a); MCL 750.92, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of CSC I as a result of allegations made by complainant, the twelve-year-old daughter of his girlfriend. The defense theory was that complainant fabricated the allegations because she was angry with defendant for punishing her and for refusing to allow her to have a boyfriend.

Complainant testified that on separate occasions defendant penetrated her vagina with his finger and tongue. She stated that she did not report defendant's actions to her mother because her mother was ill with HIV, and that defendant told her that no one would believe her if she reported his actions. Eventually complainant reported the abuse to a school counselor. Complainant stated that her life after the abuse began was bad because she was frightened, and that she continued to pursue the matter after it came to light because she wanted to see defendant punished. Defendant did not object to the prosecutor's questioning of complainant.

Defendant testified¹ and denied that either he or complainant's mother was HIV positive. He stated that on one occasion he punished complainant when she left the house at night without

¹ Defendant testified via an interpreter.

permission, and denied that he committed the charged offenses. On cross-examination the prosecutor asked defendant why complainant would put herself through the trauma of testifying if her accusations were not true. Defendant stated that it must be for a personal reason.

During closing argument the prosecutor emphasized that complainant felt isolated because of her mother's perceived illness and her wish to have a father. The prosecutor asserted that complainant had no motivation to lie and to put herself in such a difficult position. Defendant did not object to the prosecutor's argument.

The jury found defendant guilty of one count of CSC I, and one count of attempted CSC II as a lesser included offense of the second charged count of CSC I. The applicable statutory sentencing guidelines recommended a minimum term range of eighty-one to 135 months for the offense of CSC I. The trial court found that complainant's isolation constituted a substantial and compelling reason to depart above the guidelines. The trial court noted that complainant was an exceptionally vulnerable child in that at the time of the incidents she spoke very little English and perceived her mother to be seriously ill and unable to help her. Defendant knew that complainant was isolated, and he took advantage of that fact. The trial court sentenced defendant to concurrent terms of fifteen to twenty-five years for CSC I and three to five years for attempted CSC II, with credit for 208 days.²

Defendant first claims he is entitled to a new trial because of prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

A prosecutor may argue based on the evidence that a witness should be believed; however, he may not appeal to the jury to sympathize with the victim. *Watson*, *supra*, 591. Similarly, a prosecutor may not argue that the jury should convict the defendant as part of its civic duty, or appeal to the jury's sense of justice. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). A civic duty argument is improper because it injects issues into the trial which are broader than the defendant's guilt or innocence, and because it encourages jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d

² The trial court did not inform defendant that he was entitled to appeal his sentence for CSC I on the ground that it exceeded the guidelines, as required by MCR 6.425(E)(4). We conclude that the error was harmless because defendant has challenged his sentence on that ground. No prejudice occurred.

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Defendant contends that he was denied due process and a fair trial by the prosecutor's repeated appeals to the jury to sympathize with complainant and to convict him as part of its civic duty. Because defendant did not object to the questions and arguments about which he now complains, absent plain error he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecution's questions to complainant regarding her motivation were designed to respond to defendant's assertion that complainant was not telling the truth, and in that respect were not improper. *Noble, supra*; *Schutte, supra*. In addition, even if the prosecution's closing argument constituted an improper appeal for sympathy and an improper civic duty argument, any prejudicial effect of the arguments could have been cured by a timely instruction. *Leshaj, supra*. Thus, any error that occurred did not seriously affect the fairness, integrity, or public reputation of the proceedings, *Carines, supra*, and reversal is not warranted on this basis.

Defendant next claims he is entitled to a new trial because of ineffective assistance of counsel. Specifically defendant asserts he was prejudiced by counsel's failure to object to the prosecution's questions and arguments that were an improper appeal to sympathy and civic duty. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As noted above, the prosecution presented evidence and arguments intended to rebut defendant's contention that the victim's allegations were false. Complainant testified that defendant penetrated her vagina with his finger and his tongue. The jury found complainant credible, as it was entitled to do, *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has not demonstrated that it is reasonably probable that the result of the proceedings would have been different had trial counsel objected to the prosecution's questions and arguments now challenged on appeal, *Carbin, supra*, and thus cannot prevail on his assertion that counsel rendered ineffective assistance.

Finally, defendant challenges his sentence for CSC I as an invalid departure from the sentencing guidelines. A trial court must impose a sentence within the calculated guidelines range unless a substantial and compelling reason exists to depart from the guidelines. MCL 769.34(3). To constitute a substantial and compelling reason for departing from the guidelines, the reason must be objective and verifiable, and must irresistibly hold the attention of the court. *People v Babcock (Babcock III)*, 469 Mich 247, 257; 666 NW2d 231 (2003). We review the trial court's conclusion that a substantial and compelling reason for departure exists for clear error. *Id.* at 265. Whether a particular factor is objective and verifiable is reviewed de novo. *Id.* Whether an objective and verifiable factor constitutes a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Id.* "[I]n departing from the guidelines range,

the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id.* at 264.

Defendant argues that the trial court abused its discretion by departing from the guidelines for the offense of CSC I and imposing a minimum term that exceeded the high end of the guidelines. Defendant asserts that the vulnerability of the victim was taken into account in the calculation of the guidelines, and that the resulting sentence was disproportionate.³ We disagree and affirm defendant's sentence for the conviction of CSC I. The guidelines account for victim vulnerability in Offense Variable 10, MCL 777.40, exploitation of vulnerable victim. Offense Variable 10 provides that ten points should be scored if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). An abuse of authority status occurs when the victim was "exploited out of fear or deference to an authority figure, including but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d).

Defendant used his position as a member of complainant's household and as a father figure to exploit her. In addition, complainant was especially isolated in that she was a recent immigrant who spoke little English and who felt that she could not tell her mother about the abuse due to her mother's illness. Defendant also effectively taunted complainant by telling her that no one would believe her if she reported his actions. The trial court did not err in finding that the depth of defendant's exploitation of complainant was given inadequate weight by the guidelines. *Armstrong, supra*. The trial court did not abuse its discretion by finding that substantial and compelling reasons existed for departing upward from the guidelines, *Babcock III, supra* at 265, and adequately articulated its reasons for exceeding the guidelines. Defendant's sentence adequately reflects the seriousness of the matter, and thus is proportionate. *Houston, supra; Babcock III, supra*.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder

³ Defendant does not challenge his sentence for the conviction of attempted CSC II.